"Every election petition shall be tried by the Chief Justice or by a Judge of the High Court nominated by the Chief Justice for the purpose."

Sub-sections (2) and (3) deal with procedural powers of the Election Judge and sub-section (4) enables interlocutory matters in connection with an election petition to be dealt with by any Judge of the High Court.

In view of these provisions of the Election Offences Ordinance it appears to me that what is involved here is an appeal from a special tribunal, namely an Election Judge, and not an appeal from a Judge of the High Court. An Election Judge would appear to be in a position analogous to that of a Judge who is the Chairman of a Commission. If this view is correct then sections 36 and 37 of the Courts Ordinance (No: 43 of 1948) have no application for these sections deal with appeals from judgments or orders of the High Court as such.

What then is the position with regard to appeals from interim or interlocutory orders made by an Election Judge? The right of appeal is not an inherent right, but one that must be expressly granted or conferred. Neither in the Constitution, nor in the Courts Ordinance, nor in the Election Offences Ordinance is this right conferred and in my view there is therefore no such right of appeal.

It appears that the desirability of prompt and final conclusions where disputes concerning representation of the people are concerned has been recognised and provided for in many Commonwealth countries. This object is generally achieved by the creation of Special Tribunals specifically empowered finally to determine such disputes.

I am fortified in the views I have expressed above by decisions of the Privy Council in appeals from Canada, Malta and Ceylon in *Joseph Theberge* v. *Philippe Laudry* [1]; *Lord Strickland* v. *Giuseppe Grima* [2]; *De Silva* v. *Attorney-General for Ceylon* [3] and *Senanayake* v. *Navaratne* [4].

These four cases were all concerned with the right of appeal from Election or Special Tribunals and I will quote briefly from them. In the Canadian appeal the Lord Chancellor (Lord Cairns) stated:—

"A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

In *Lord Strickland* v. *Grima* the Canadian case was referred to in these terms:—

"His Majesty, in these letters patent is merely adopting principles, to which all Lord Cairns's reasoning applies. He assumes that any enlightened legislative body would itself choose just such a tribunal as he himself prescribes for the determination of all such questions: accordingly, he creates a jurisdiction in terms of finality which leave no room for any review by himself.

And the history of this case, as their Lordships have detailed it, serves to demonstrate the convenience of the course in this instance taken. The action impugning the election here was commenced on July 5, 1928: the decision of the Court of Appeal was given in little more than a month — on August 14, 1928. It is more than a year later that this appeal comes before the Board."

In *De Silva's case* Lord Simonds stated:—

"It was contended for the petitioner that different considerations applied where, as here, the jurisdiction of the election judge to hear election petitions was not substituted for that of the legislative body itself but was created *de novo* on the establishment of that body. But that appeared to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland* v. *Grima*. Such a dispute as was here involved concerned the rights and privileges of a legislative assembly, and, whether that assembly assumed to decide such a dispute itself or it was submitted to the determination of a tribunal established for that purpose, the subject matter was such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council."

Finally in *Senanayake* v. *Navaratne* occurs the following passage:—

"They are satisfied that the election judge, as established by the Order-in-Council of 1946, was a tribunal with a jurisdiction, not only to determine finally the question whether the corrupt practices alleged in the petition had been committed, but also to determine finally whether, upon the true construction of the Order-in-Council, it was competent in the circumstances for the petitioner to maintain his amended petition. Their Lordships do not desire to repeat what was said by their predecessors in the cases cited. Suffice it to say that, in their Lordships' opinion, the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected, make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown."

I would therefore strike out the notice of appeal filed on the 1st of June, 1962, with costs to the petitioner.

Good J.A. and **Suffian J.** concurred.

Solicitors: *Braddell & Ramani: Allen & Gledhill.*

GOVINDARAJU v. KRISHNAN

[A.C.J. (Ismail Khan J.) September 5, 1962]

[Seremban — Civil Appeal No. 4 of 1961]

Landlord and Tenant — Letting of premises on State land — Determination of tenancy — Whether transaction prohibited by Land Rules, 1930, r.41 — Admission as tenant — Estoppel from denying — Evidence Ordinance, 1950, s.116.

Land Laws — T.O.L. holder — Letting of premises on State land — Whether transfer of licence — Land Rules, 1930, r.41.

The appellant whose premises stood on State land of which he was in lawful possession under a Temporary Occupation Licence rented two rooms to the respondent at a monthly rent of $30. This tenancy was duly determined by a notice in writing. Though the tenancy was not one protected by the Control of Rent Ordinance, 1956, the respondent refused to deliver up possession arguing that the tenancy was illegal, void and of no effect because the appellant was only the holder of a Temporary Occupation Licence over the premises. The learned President held that this was a dealing with the Temporary Occupation Licence and any dealing with such a licence was prohibited by rule 41 of the Land Rules.

Held: (1) the wording of rule 41 of the Land Rules was that no licence for the temporary occupation of State land shall be transferable. "Dealings" which do not amount to a "transfer" are not therefore caught by the rule;

(2) the letting of two rooms on the premises did not amount to a transfer of the licence;

(3) as the respondent admitted that he was a monthly tenant, section 116 of the Evidence Ordinance applied and he was estopped from denying that he was a tenant;

(4) the tenancy having been lawfully determined, the respondent was a trespasser against whom the appellant was entitled to an order for possession.

CIVIL APPEAL.

Lim Kean Chye for the appellant.

Balwant Singh for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an appeal by a landlord whose claim to possession of two rooms let by him to a tenant, the respondent, was dismissed with costs by the President of the Sessions Court, Seremban. The decision of the learned President turned entirely on a question of law which counsel for the parties agreed should be disposed of as a preliminary issue. In the grounds of judgment it was said that "the point of law to be decided is whether or not there is existing between the parties a landlord-tenant relationship at law." This, of course, was quite incorrect. The real issue raised in the pleadings was whether the letting of a portion of premises erected on State land by the holder of a Temporary Occupation Licence was a transaction prohibited by rule 41 of the Land Rules, 1930, and void consequently for illegality under section 24 of the Contracts Ordinance.

The admitted facts are as follows: The appellant's premises stand on State land of which he was and is in lawful possession under a Temporary Occupation Licence. Since 1959 or earlier two rooms therein were let to the respondent at a monthly rent of $30. This tenancy was duly determined on 30th November, 1960 by a notice in writing dated 13th October, 1960, the validity of which never was challenged. It was not a protected tenancy under the Control of Rent Ordinance, 1956. Nevertheless, the respondent refused to deliver up vacant possession.

The respondent's defence was that the tenancy was illegal, void and of no effect because the appellant was only the holder of a Temporary Occupation Licence over the premises. Mr. Balwant Singh's contention on behalf of the respondent was that a licence was personal to the appellant himself, that the holder of a Temporary Occupation Licence was not entitled to transfer, assign or let the whole or any part of the premises to a third person or to deal with the licence in any way, and that any dealing with such licence, being prohibited by rule 41 of the Land Rules, was void for illegality.

The learned President agreed with these submissions on five grounds: (a) that there is no estoppel against the express provisions of a statute; (b) that if a contract is void or illegal, no estoppel arises; (c) that the appellant had "no title in the land" but a mere licence which, moreover, imposed restrictions on any dealings with the land; (d) that section 116 of the Evidence Ordinance applies "only in normal circumstances"; and (e) that the Court is bound to take notice of the illegality of the transaction between the parties. The third and fourth grounds clearly were wrong, the others being merely a statement of general principles.

As the point of law involved the interpretation of rule 41, I should have thought that the twelve words in which that rule is set out would be quoted in the judgment and their proper construction considered. Such, however, was not the case. The rule says:—

> "No licence for the temporary occupation of State land shall be transferable."

Had the learned President kept these words before him he could not have failed to ask himself: "Was the letting on a monthly tenancy of two rooms in a house built on State land a transfer or a colourable attempt to transfer the appellant's rights and interests under his Temporary Occupation Licence?" To this question there can be only one answer. There was no justification for substituting "any dealing" for "transfer" and making an unauthorised amendment in the Land Rules.

As regards the question of estoppel, the respondent had expressly admitted in his defence that he was a monthly tenant. Hence section 116 of the Evidence Ordinance ought to have been applied. No reasons or authority had been given or cited to show why this case was so abnormal as to exclude the operation of the well-known rule relating to title by estoppel. It is elementary law that no title need be shown at all when the tenant is estopped from denying the title of his landlord. Upon the lawful determination of a tenancy, the tenant who remains in possession against the will of the landlord becomes a trespasser unless he is a protected tenant under the Control of Rent Ordinance. A person in possession of land or entitled to immediate possession can maintain, without proof of his own title, an action against a trespasser and the latter cannot set up *jus tertii* unless he claims under it. The ultimate logical absurdity of the decision is that it upheld the existence of some sort of right in a trespasser to continue his trespass for all time against the man who was in possession and entitled to possession. The decision of the learned President therefore must be set aside.

Before I conclude I ought to mention that there is on the pleadings only one question of fact which remains in issue in this case, namely, what if any, was the rent in arrear? I have thought that, in the circumstances of this case, and considering perhaps the means of the parties, and the fact that the appellant as landlord would clearly be entitled to double rent from the 1st November, 1960, it would be in the appellant's own interests to waive all claim to such arrears and thus render it unnecessary for me to refer this case back to the learned President. Since the

appellant, by his counsel, has so agreed, it only remains for me to allow this appeal, set aside the order of the learned President, and order that the respondent do deliver up vacant possession of the two rooms in question on or before the 30th September, 1962, and that the respondent do further pay to the appellant double rent with effect from 1st November, 1960 pursuant to the provisions of subsection (4) of section 28 of the Civil Law Ordinance, 1956 until possession is given up by him. As to costs, the appellant will have the costs of this appeal and in the Court below.

Appeal allowed.

Solicitors: *P. G. Lim; Balwant Singh & Co.*

BEECHAM (MALAYA) LTD. v. YUNUS

[C.A. (Thomson C.J., Syed Sheh Barakbah and Azmi JJ.) May 6, 1962]

[K.B. — F.M. Civil Appeal No. 48 of 1961]

Master and Servant — Vicarious liability — Servant who was the driver allowing a third person to drive — Lorry meeting with accident — Negligence of 3rd person who was driving — Whether master vicariously liable.

Practice and Procedure — Whether Court should consider question of negligence that was not included in grounds of appeal.

Evidence — Calling of, by judge, where parties had not — Judge has no power to dictate.

The appellant's lorry collided with the respondent's lorry which was driven by one X. This X was not the driver of the respondent but he drove the lorry with the knowledge of the respondent's driver who was sitting by his side. It was contended for the respondent that: (1) there was no vicarious liability on his part because he had no knowledge of the fact that the said X was driving the lorry, (2) negligence which was denied by the respondent was not proved by the appellant.

Held: (1) there was ample evidence to show that the driver was the servant of the respondent and that the lorry was driven for the purpose of the respondent's business and although he (respondent) was not present when the lorry was being driven by the said X the driver was there by his side. In the circumstances the respondent was vicariously liable for the negligent act of the said X. *Rickets* v. *Thos. Tilling Ltd.* (1) and *Marsh* v. *Moores* (2) followed;

(2) the court should not consider the question of negligence at this stage when it was not included in the grounds of appeal. Following *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (3) and *Wilson & Anor.* v. *United Counties Bank Ltd.* (4).

Per **Thomson C.J.**: ". . . . . in my view in making an order for a retrial, which in effect required the calling of evidence which the parties themselves had not called, the trial Judge was going to some extent beyond his powers. . . . . In my opinion it is thus clear that a Judge has no power to dictate to the parties what witnesses they shall call:"

Cases referred to:—

(1) *Rickets* v. *Thos. Tilling Ltd.* [1915] 1 K.B. 644.
(2) *Marsh* v. *Moores* [1949] 2 K.B. 208 at p. 217.
(3) *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (1889) 40 Ch. D. 100.
(4) *Wilson & Anor.* v. *United Counties Bank Ltd.* [1920] A.C. 102, 106.
(5) *In re Enoch & Zaretzky, Bock & Co.'s Arbitration* [1910] 1 K.B. 327.
(6) *Coulson* v. *Disborough* [1894] 2 Q.B. 316.

COURT OF APPEAL.

H. L. Wrigglesworth for the appellants.

N. Sharma for the respondent.

Syed Sheh Barakbah J. (delivering oral judgment): This is an appeal against the judgment of the High Court in allowing the appeal against the judgment of the learned Magistrate.

The brief facts are that there was a collision between the lorry belonging to the plaintiff and that of defendant No. 1 which was driven by defendant No. 2 who was not the driver of defendant No. 1 but defendant No. 2 drove the lorry with the knowledge of the 1st defendant's driver who was sitting by his side.

The point raised by Mr. Sharma, counsel for the respondent (defendant No. 1), was that there was no vicarious liability on the part of defendant No. 1 who had no knowledge of the fact that defendant No. 2 was driving the lorry. On this point there was ample evidence to show that the driver was the servant of respondent and that the lorry was driven for the purpose of respondent's business and although he was not present when the lorry was being driven by defendant No. 2, the driver was there by his side. In the circumstances the respondent was vicariously liable for the negligent act of defendant No. 2. I need only quote two authorities on this point. There was the case of *Rickets* v. *Thos. Tilling Ltd.* (1) and there was also the judgment of Lord Goddard in *Marsh* v. *Moores* (2).

The next point raised by the said learned counsel was that negligence which was denied by the defendants was not proved by the appellant. Negligence was alleged in the pleadings but it was not proved at the hearing. According to the notes of evidence at page 9 at the beginning just two lines below paragraph D it is stated —

"Negligence is being admitted by 2nd defendant"

and after that nothing was mentioned about negligence in the evidence. Under cross-examination at page 11 of the record defendant No. 1 stated —

"I agree that the lorry of mine was to go to Kuala Krai to take goods. My complaint solely is that Hamid was my driver and why should defendant No. 2 was driving. I admit Hamid bin Salleh has full control of the lorry and no one else. I agree Hamid is my servant. I gave the lorry T.3604 under the sole care and charge of Hamid bin Salleh."

And in the grounds of appeal to the High Court respondent merely relied on the fact that the defendant No. 2 was not his servant.

Now, should this Court consider the question of negligence at this stage when it is not included in the grounds of appeal. I can do no better than quote the case of *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (3). At the bottom of the head note it is stated —

"And in a case where the defendant had in his pleadings insisted on his right to arbitration, but had failed to raise the point at the hearing and had gone into evidence on the merits, the Court of Appeal refused to allow the point to be raised on the appeal."

And on page 105, Cotton L.J. states —

"In my opinion the parties ought not to be allowed to do that. If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time."